No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSEN and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant, Fred Johnsen, was found guilty after trial by the Court, on six counts of an indictment. He was charged in each count with participating in the known presentation of Federal Housing Administration Applications. Three of the presentations took place more than three years prior to the filing of the indictment.

Statement of Facts.

The appellant, Fred Johnsen, was one of the defendants named in the indictment, found and filed in the above entitled cause on the 28th day of June, 1950. The appellant thereafter challenged the legal sufficiency of certain counts to the indictment, including Counts 2, 4 and 39 by Motion to Dismiss and Quash "upon the ground that each and

all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282." [Tr. of Rec. p. 8.]

Thereafter a Bill and a Motion for a Bill of Particulars was filed in an effort to obtain information as to the commission of the alleged acts.

Both motions were heard and denied by the Court on September 25, 1950 [Tr. of Rec. pp. 30 and 40], on the ground that the acts complained of were a "fraud" against the United States. [Tr. of Rec. pp. 48-51.]

On October 30, 1950, appellant plead not guilty to all counts contained in the indictment. [Tr. of Rec. pp. 40-42.]

Thereafter appellant Fred Johnsen was found guilty after trial by the Court on Counts 2, 4, 19, 23, 30 and 39.

On the 4th day of June, 1951, the Court entered its Judgment and Commitment adjudging that appellant had been convicted upon his plea of not guilty, and a finding of guilty as to each of Counts 2, 4, 19, 23, 30, and 39, of the offenses of (Count 2), that on or about Feb. 6, 1947, in Los Angeles County, California, defendant did prepare and present a credit application to the Bank of America N. T. & S. A., with intent such loan be insured by the Federal Housing Administration, representing said credit was for the purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for

purchase of materials for construction of a new dwelling house; (Counts 4, 19, 23, 30 and 39 charge violations similar to Count 2), as charged in said Indictment.

The Court thereupon ordered the defendant committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2, and pay unto the United States of America a fine of $1,000.00 on Count 4, a fine of $1,000.00 on Count 19, a fine of $1,000.00 on Count 23, a fine of $1,000.00 on Count 30, and a fine of $1,000.00 on Count 39; said sentences on Counts 23, 30 and 39 to run concurrently with sentences on Counts 4 and 19, so that the total fine to be paid is $2,000.00, and the Clerk is authorized to accept $2,000.00 in full satisfaction of said fines; and defendant shall stand committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

Issues.

It is respectfully submitted that the following issues are presented:

(1) Are Counts 2, 6 and 39 of the Indictment barred by the Statute of Limitations and particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282?

(2) Does Count 4 state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof?

STATEMENT OF LAW.

I.

That Counts Two (2), Four (4) and Thirty-nine (39) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Appellant Fred Johnsen incorporates herein by reference the argument on this point of the appellant Al Freed and contained on pages 4 to 22, inclusive, of appellant Al Freed's Opening Brief.

We wish, however, to call the Court's attention to the unreported case: *United States of America, Appellant, v. Louise Virginia Smith,* on appeal from the United States District Court for the Western District of Texas.

In the *Smith* case, on October 2, 1950, an indictment of two counts was filed in the District Court for the Western District of Texas charging the appellee Smith with having, on or about July 1, 1947, violated Section 29 of the Criminal Code (18 U. S. C. (1946 Ed.), 73), now 18 U. S. C. 495. Count 1 charged that she falsely made and forged the name of the payee on the back of a check drawn on the Treasurer of the United States for the purpose of obtaining the amount of the check from the Government. Count 2 charged that she uttered the check as true, knowing the indorsement to be forged, with intent to defraud the United States.

The appellee moved to dismiss the indictment on the grounds that since it showed on its face that the offenses

charged had been committed more than three years prior to the return of the indictment it was barred by limitations, and that these offenses did not come within the provisions of 18 U. S. C. 3287, which provides for the suspension of limitations in certain classes of cases while the United States is at war. On October 16, 1950, the District Court granted the motion to dismiss, the order stating simply that the dismissal was "on the ground that more than three years had elapsed from the time of the commission of the offense as alleged in the indictment and the return of the indictment."

On November 9, 1950, the Government filed a petition for rehearing pointing out that the offenses charged in the indictment involved defrauding the United States; that under the Wartime Suspension of Limitations Act of 1942, as amended (18 U. S. C. (1946 Ed.) 590a), the running of the statute of limitations applicable to such offenses was suspended "until three years after the termination of hostilities in World War II"; that hostilities in World War II were declared terminated as of December 31, 1946, by Presidential Proclamation 2714 of that date; that accordingly, the three-year statute of limitations applicable to the offenses charged did not commence to run until three years after December 31, 1946, *i. e.,* until December 31, 1949; and that, consequently, the indictment which was returned on October 2, 1950, was not barred by the Statute of Limitations.

The District Court denied the petition for rehearing, holding that the indictment had been properly dismissed

on the ground that it had been filed too late, *i. e.,* more than three years after the date of the commission of the alleged offenses. In so holding, the District Court stated:

> "The Court is of the opinion that the Suspension Act, 18 U. S. C. 590(a), being the Act of August 24, 1942, as amended in 1944, applies only to offenses committed during the time prior to the termination of hostilities. Hostilities were proclaimed terminated as of December 31, 1946. The alleged offense is charged to have occurred July 1, 1947, and the three-year statute of limitations barred prosecution of this offense three years thereafter. * * * The purpose of the amendment (18 U. S. C. 590(a)) was not to let crimes pass unpunished which had been committed in the hurly burly of war * * * United States v. Gottlieb, 165 Fed. 2d 360, page 368."

Thereafter, and on February 1, 1951, the United States filed its notice of appeal to the Supreme Court of the United States and this Court noted probable jurisdiction on October 8, 1951.

II.

That Count II of the Indictment Does Not State a Public Offense in That It Is Not Indicated Therein That the Application Therein Described Was for Credit on the Amount Thereof.

Appellant Fred Johnsen incorporate herein by reference the argument on this point of the appellant Al Freed as contained on page 31 to the word "Conclusion" on page 34.

Conclusion.

It is submitted that Counts Two (2), Four (4), and Thirty-nine (39) are all, by the facts stated therein, barred by the Statute of Limitations, and Count Four (4) fails to state a cause of action.

It is further submitted that for such reasons, the judgment and commitment of the Trial Court as to Counts Two (2), Four (4) and Thirty-nine (39) should be reversed by this Honorable Court.

Respectfully submitted,

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